No. 90-285

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

LITTON FINANCIAL PRINTING DIVISION,
A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## REPLY BRIEF FOR PETITIONER

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## QUESTION PRESENTED

On November 13, 1990 this Court entered the following order in the above-entitled case:

> The petition for a writ of certiorari is granted, limited to Question 2 presented by the petition.

Question 2 presented by the petition is as follows:

> When the facts upon which a seniority-related grievance is based occur almost one year after the expiration of the collective bargaining agreement recognizing seniority and requiring arbitration, does Section 8(a)(5) of the National Labor Relations Act require the employer to submit to the arbitration of the grievance?*

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* The Union poses two questions which are not the same as Question 2 in the petition for certiorari.

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# REPLY BRIEF FOR PETITIONER

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## STATEMENT OF THE CASE

### A. Facts:

In order to dispel any implication petitioner was a "wrongdoer" unlawfully refusing to bargain with the Union during the 11-month period between contract expiration (October 5, 1979) and the grievance events (late August and early September 1980), the following chronology is set forth:

- 7/12/79 An employee files a petition to decertify the union.
- 7/26/79 Company and Union sign a stipulation for an election.
- 8/17/79 Election is held.
- 8/24/79 Company files objections to conduct affecting results of election.
- 9/28/79 Acting Regional Director issues Report on Objections recommending a hearing on certain objections.
- 10/5/79 Contract expires.
- 10/8/79 Company files exceptions to report.
- 1/28/80 Board issues decision and order adopting report and ordering a hearing.
- 3/18/80 Hearing is held.
- 4/3/80 Hearing Officer issues report.
- 4/14/80 Company files exceptions to report.
- 7/2/80 Board issues decision certifying Union.
- 9/30/80 Board issues complaint alleging Company has unlawfully refused to bargain since *August 1, 1980.*
- 6/12/81 Board issues decision finding Company has unlawfully refused to bargain since *August 1, 1980.*

According to the Board's own documents, the Union's representative status was legally in question until July 2, 1980, when it was certified and petitioner did not refuse to bargain until August 1, 1980, so the contract had



expired 10 months before petitioner is even accused of refusing to bargain.[1]

The only way for an employer to obtain Court review of a Board certification is to refuse to bargain with the certified union, which refusal is characterized as a "technical" refusal to bargain. This is not the type of "wrongdoing" which the courts refer to when they prevent a party from "profiting from its own wrongdoing." For a period of about 1 month of the 11-month hiatus, petitioner refused to bargain with the Union as a means of challenging the Board's decision to overrule its objections to conduct affecting the results of the election. That refusal, for a 1-month period, following a period of 10 months when the Union's representative status was legally in question, can hardly be characterized as "wrongdoing." Indeed, during the period July 12, 1979 and July 2, 1980, petitioner could not lawfully have bargained with the Union over the elimination of the obligation to arbitrate post-termination grievances. *Dresser Industries, Inc.*, 264 NLRB 1088 (1982).

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[1] In the representation proceeding, an employee filed a petition to decertify the Union. During the period before the election, Union representatives told employees they would forfeit their pension credits of less than ten years if the Union lost the election. The Union won the election by 1 vote, 28 to 27. The Company filed objections to conduct affecting the results of the election based on these threats. *Litton Financial Printing Division*, 256 NLRB 516 (1981), *Litton Financial Printing Division*, Case No. 32-RD-170. The Court may take judicial notice of the record in Case 32-RD-170. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Zantop Air Transport Corp.*, 394 F.2d 36, 40 (6th Cir. 1968). *United States v. An Undetermined Quantity*, 583 F.2d 942 (7th Cir. 1978).

**B. Proceedings Below:**

The Union seeks to raise the "unilateral change of working conditions" theory in this case. It should be noted:

1. No complaint allegation was ever made in this case that petitioner had unlawfully unilaterally changed a working condition by refusing to arbitrate.
2. Neither the Board nor the Court below made such a finding.

In its opening brief, in arguing that §§ 8(a)(5) and (d) of the Act do not require the arbitration of post-termination disputes, petitioner stated, "There is no complaint allegation or Board or court finding that petitioner refused to meet with the union at a reasonable time and confer in good faith with respect to wages, hours or conditions of employment, or the negotiation of an agreement or any question arising under an agreement." Brief for Petitioner, p. 12-13. While petitioner's statement is overly broad, inasmuch as the Board and Court ruled against petitioner on the decisional bargaining issue, it is precisely correct with regard to the arbitration issue before this Court.

## ARGUMENT

The Union has filed a 49-page brief, with about 28% of its total line space devoted to small-print footnotes. The brief cites 81 reported cases.

*This case is not that complicated.*

Much of the Union's brief is devoted to pointing out the worthiness of arbitration and the significant role it plays in the collective bargaining system. Its argument



simply does not address the issue before this Court regarding the inapplicability of §8(a)(5). The Union's second argument advances the "unilateral change of working conditions" theory which is not within the question presented in this case and otherwise lacks merit.

### A. Congress Did Not Elect To Make The Refusal To Arbitrate A Post-Termination Grievance An Unfair Labor Practice.

Petitioner is not attacking (1) the institution of arbitration, (2) the collective bargaining system, or (3) a union's right to pursue the arbitration of a post-termination dispute by filing a civil action to compel arbitration under §301(a) of the Act. What petitioner does contend is that Congress, in §§ 8(a)(5) and (d) of the Act, did not make it an employer unfair labor practice to refuse to arbitrate a post-termination dispute. It is that simple, but the Union's brief nowhere addresses that issue. Its arguments would be more appropriately addressed to a Court in a §301(a) action to compel an employer to arbitrate a post-termination dispute, but they are totally irrelevant to the issue presented here: Did Congress make it an unfair labor practice to refuse to arbitrate a post-termination dispute?

Arbitration plays a role in the collective bargaining system. Our national policy favors the resolution of disputes arising from *existing* collective bargaining

agreements through arbitration, rather than the courts or by the exercise of economic power. 29 U.S.C. §173(d).[2] But that does not mean that the Board, without congressional authority, can say it is an unfair labor practice to refuse to arbitrate a post-termination dispute.

The world will not come crashing down on the institution of arbitration and the collective bargaining system will not be left in shambles if this Court holds petitioner did not violate §8(a)(5) of the Act by refusing to arbitrate a dispute which arose eleven months after contract expiration. 29 U.S.C. §158(a). Congress has provided §301(a) of the Act as an avenue to compel the arbitration of post-termination disputes where appropriate. 29 U.S.C. §185(a). It simply has not provided an unfair labor practice proceeding as an alternate route.[3]

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[2] Neither the Board nor the Union (nor the courts, for that matter) have faced up to the fact Congress referred to "existing" collective bargaining agreements in stating the preference for arbitration.

[3] Nor will the courts be flooded with litigation and American industry be shut down by strikes should the Court decide to modify or restrict the *Nolde* theory. The overwhelming majority of arbitrations occur while the collective bargaining agreement is still in effect. Disputes based on pretermination events are admittedly arbitrable in a post-termination arbitration, as are disputes based on accrued or vested rights. The parties may, if they wish, specifically provide for the arbitration of other post-termination disputes. The relatively few nonarbitrable disputes which are left will not shut down the court system and destroy our economy.



**B. The Question Whether It Is A Violation Of §8(a)(5) Of The Act To Refuse To Arbitrate A Post-Termination Dispute Is Properly Before This Court.**

The Union contends this issue was not raised in the court below or in the petition for certiorari. Brief of Respondent (Union), p. 10, n. 3. This is a puzzling contention. In its Reply Brief in the court below (p. 1), petitioner specifically argued that ". . . *Nolde Bros. v. Bakery Workers Local 358,* 430 U.S. 243, involved a civil action brought by a union against an employer to compel arbitration under a collective bargaining agreement, pursuant to a specific statute providing for such actions.[1] It did not, as here, involve a finding in an unfair labor practice proceeding that the employer had unlawfully refused to meet with a union at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.[2] " (Footnotes 1 and 2 set forth §§ 301(a) and 8(d) and are omitted here.) In its opinion (Pet. App. A15, n. 7), the court below noted the distinction but ignored it, choosing to rely on *Nolde* to support its decision. In the petition for certiorari (p. 14-15), petitioner argued quite specifically, in support of its argument regarding question 2, that the court below had stretched *Nolde* beyond its limits "for another reason. *Nolde Bros.* involved a suit brought under Section 301(a) . . . [b]ut the instant case involves an allegation Litton violated Section 8(a)(5) of the . . . Act. Section 8(d) of the Act very specifically defines an employer's obligation under Section 8(a)(5). It seems pure fiction to hold that a refusal to arbitrate a dispute based on facts transpiring almost one year after contract expiration is the same

thing as refusing (in the words of Section 8(d)) '. . . to meet at reasonable times and confer in good faith with respect to wages, hours . . . .' "

### C. The Union's "Unilateral Change Of Working Conditions" Argument Is Beyond The Scope Of The Question Presented For Review In This Proceeding.

Petitioner filed a timely petition for certiorari presenting the question: When the facts upon which a seniority-related grievance is based occur almost one year after the expiration of the collective bargaining agreement recognizing seniority and requiring arbitration, does Section 8(a)(5) of the National Labor Relations Act require the employer to submit to the arbitration of the grievance? Pet. Cert. (i). This Court's order granting the petition specifically limited the grant to that question. Order, November 13, 1990. In its petition, petitioner argued the court below had stretched *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO,* 430 U.S. 243, beyond its intended limits. Petitioner argued, (1) the language of the CBA clearly negated the *Nolde* presumption of arbitrability, (2) various courts of appeals had issued decisions in conflict over the significance of the passage of time between contract expiration and grievance events, and (3) *Nolde* did not apply to a §8(a)(5) proceeding. Pet. Cert. 10-15. No question was presented regarding the "unilateral change of working conditions" theory.

The Union did not file a cross-petition for writ of certiorari as it had the right to do under Rule 12.3, Rules of the Supreme Court. Rule 10.1, Rules of the Supreme Court, indicates "the character of reasons that will be



considered" by this Court in deciding a petition for a writ of certiorari. The issue which the Union now seeks to bring before this Court in its brief does not appear to fall within the ambit of Rule 10.1(a). The court below noted the Union's *Katz* argument (Pet. App. A16-A17) but "decline[d] the parties' invitation to resolve their dispute over *Indiana & Michigan.*" Pet. App. A18. Thus, in the words of Rule 10.1(a), the court below did not render "a decision in conflict with the decision of another United States court of appeals in the same matter . . . ." It specifically declined to render a decision on the "unilateral change of working conditions theory," so how can its decision be in conflict with the decision of another court of appeals on the same question? Further, in the words of Rule 10.1(c), the court below did not decide "an important question of federal law which has not been, but should be settled by this Court. . . ." It declined to decide the question. Nor, again in the words of Rule 10.1(c), did the court below decide "a federal question in a way that conflicts with the applicable decisions of [the Supreme Court]," for it declined to decide the question. The Union should not be allowed to piggyback on petitioner's petition for certiorari an issue which it could not, and did not even attempt to, raise in a cross-petition for certiorari. In its brief, the Union acknowledges the deficiency in its position. Brief of Respondent (Union), p. 4.

### D. The *Katz* Theory Of "Unilateral Change Of Working Conditions" Does Not Apply To The Facts Of This Case.

In *Katz*, the parties were actively engaged in bargaining on a number of mandatory subjects, including sick leave and wages. Proposals and counterproposals with respect to sick leave had been made at three sessions, when the employer, without notifying or consulting with the union, announced changes in its current sick leave plan. The *Katz* Court found a §8(a)(5) violation because such action "would inhibit the useful discussion contemplated by Congress in imposing the specific obligation to bargain collectively." 369 U.S. at 744. Here, there were no active negotiations taking place and thus no discussion to inhibit. It is highly significant petitioner at all times offered to negotiate with the Union over the effects of the layoffs, but the Union requested no such discussion. Pet. App. A6, B4, B5, JA 65. In *Katz*, the employer, during active negotiations, offered one plan for automatic wage increases, then, without advising or consulting with the union, announced an entirely different wage plan. This, of course, implementing a benefit during active negotiations without first offering it to the union, is recognized as garden variety bad-faith bargaining, and the *Katz* Court so found. 369 U.S. at 745. No such issue exists here because negotiations were not in progress or requested. The third unilateral action in *Katz* related to merit increases which the employer implemented without notice to the union, even though the subject of merit increases had been raised at three negotiating sessions. Again, the *Katz* Court found a violation, apparently on the same "it inhibits the useful discussion contemplated by Congress"



theory. 369 U.S. at 746. Here, there were no negotiations taking place in which discussion could possibly be inhibited even though discussion over the effects of the layoffs was available to the Union simply for the asking.

### E. The Board Has Properly Excluded Arbitration Provisions In Expired Contracts From The Reach Of *Katz*.

In *Katz*, the Court expressly did "not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action. . . ." 369 U.S. at 748. In *Indiana & Michigan Electric Co.*, the Board reviewed the rather on-again, off-again history of its rules on post-contract termination arbitration and determined to clarify "Board law concerning the postexpiration duty to arbitrate . . . ." 284 NLRB at 54-57. Relying upon legislative history, a recognition that arbitration is voluntary, and is grounded on the mutual consent theory adopted by this Court, the Board reached the conclusion "that the arbitration commitment arises solely from mutual consent and that Congress did not intend the National Labor Relations Act to operate to create a statutory duty to arbitrate." 284 NLRB at 57-58.

In *Indiana & Michigan*, the union "argue[d] that because arbitration is a mandatory subject of bargaining, [the Board is] compelled by the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1961), to conclude that the [employer's] unilateral abandonment of that procedure during the contractual hiatus violated Section 8(a)(5)." 284 NLRB at 58. The Board rejected the argument:

"We do not believe that the Court's general formulation in *Katz* of the requirements imposed by Section 8(a)(5) is applicable to the post-expiration withdrawal from arbitration. To conclude otherwise flies in the face of the specific admonition of the Court and the clear intent of Congress that submission to arbitration is purely a matter of consent and cannot be mandated by operation of the Act. Rather, we find, because an agreement to arbitrate is a product of the parties' mutual consent to relinquish economic weapons, such as strikes or lockouts, otherwise available under the Act to resolve disputes, that the duty to arbitrate is sui generis. It cannot be compared to the terms and conditions of employment routinely perpetuated by the constraints of *Katz*. We believe, therefore, that if a duty to arbitrate arising from such mutual and voluntary consent survives the expiration of the written agreement embodying it, it cannot be solely on the basis of general rules of bargaining developed under the National Labor Relations Act. Our view in this regard is not unprecedented. We have also declined to apply *Katz* to unilateral abandonment of union-security and dues-checkoff provisions following contract expiration because they, like arbitration, are purely creatures of contract. See *Bethlehem Steel Co.*,



136 NLRB 1500, 1502 (1962), affd. in pertinent part sub nom. *Shipbuilders v. NLRB*, 320 F.2d 615 (3d Cir. 1963)." (Footnote omitted). 284 NLRB at 58-59.

In its brief (p. 37), the Union contends "None of these reasons withstands a moment's consideration." This is followed by 12 pages of argument. The Union first attacks *Indiana & Michigan's* reliance on the analogy of arbitration to union-security and dues-checkoff provisions. Section 8(a)(3) of the Act does require "an agreement" to legitimatize a union-security clause. 29 U.S.C. §158(a)(3). However, this Court made it quite clear in *Katz* that its decision did "not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action. . . ." 369 U.S. at 239. The Board's rationale for equating arbitration to union security does not appear to be so seriously flawed that it can be said to be unreasonable, *i.e.*, exceeding the bounds of reason or moderation. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495. There is no real distinction between contractual consent based upon a statutory requirement (union security) and mutual assent based upon decades of Supreme Court case law (arbitration). To hold otherwise is to exalt form over substance. The proper reply to the Union's contention consent to union security is required by statute while mutual assent to arbitration is only required by Supreme Court case law is, "So what!"

The Union, citing §302(c)(4) of the Act, 29 U.S.C. §186(c)(4), argues dues checkoff is only operable, by statute, when there is a written agreement to have dues checkoff. Therefore, says the Union, the Board's analogy between arbitration and dues checkoff is not a valid one. Aside from the fact there is no significant

distinction in requiring consent by reason of Supreme Court case law rather than statute, §302(c)(4), literally read, does not require a written agreement between the *employer and union* authorizing checkoff. What the section does require is that the employer have "a written assignment" *from the employee*. There is nothing in the section requiring a written contract between the employer and union authorizing dues checkoff, so the Board does have a precedent recognizing the unilateral abandonment of a working condition which does not, by statute, require an agreement between employer and union.

In any event, there is a substantial nexus between a statute and the Board's decision not to apply *Katz* to the duty to arbitrate. Section 13 of the Act, 29 U.S.C. §163, provides that "[n]othing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." Those are strong words. Presumably, when Congress adopted the phrase "nothing in this Act," it meant to include §8(a)(5). But if an employer must arbitrate a dispute under an expired agreement, in order to avoid a §8(a)(5) violation under *Katz*, the union cannot strike over that dispute. But §13 says that "nothing in this Act" (including §8(a)(5), presumably) can be construed so as either to interfere with, impede or diminish *in any way* the right to strike. There is, then, a statutory basis for not applying *Katz* in this case.

The Union argues *Indiana & Michigan* is flawed because all terms and conditions are the result of mutual assent, not just the arbitration obligation. But just because all terms and conditions of employment (including arbitration) are based on mutual assent does not mean



they cannot be treated differently if a rationale exists for doing so. The Board appears to have supplied that rationale. Arbitration is the only term of employment pursuant to which the employer relinquishes its right to use economic weapons and a union's statutorily-protected right to strike might be eliminated. On the very face of it, an agreement to submit disputes of unlimited magnitude to a third party for resolution is not in the same category as a contractual provision providing for a 10-minute break period.

### F. The Union Cannot Be Allowed To Strike Over Post-Termination Disputes Concerning Which The Employer Must Arbitrate.

If an employer is compelled by §8(a)(5) to arbitrate a post-termination dispute, the union cannot strike over that dispute, the arbitration and no-strike clauses being the "quid pro quo" for each other. 29 U.S.C. §158(a). This result undermines §13 of the Act, which provides that "nothing" in the Act is to be construed to interfere with, impede or diminish in any way the right to strike. 29 U.S.C. §163. It is not a sufficient answer to say the union waives its right to strike when its seeks to arbitrate a post-termination dispute because it may be the employer who is seeking the arbitration of a post-termination dispute. Clearly, the employer cannot waive for the union its right to strike. Nor should the union be given the option to (1) arbitrate by seeking to arbitrate a post-termination grievance or (2) strike by striking and relying on §13 of the Act and the strict rules regarding waiver.

It cannot be successfully argued in this case that the Union waived its right to strike in Section 21A of the

collective bargaining agreement (JA 34-35), as the Union and Board both contend. Brief of Respondent (Union), p. 19, n. 11. Brief for the National Labor Relations Board, pp. 24-25, n. 22. This argument was accepted by the court below, which characterized Section 21 as "a rather unusual provision [which] contains its own 'no-strike clause'. . . ." Pet. App. A4, n.1.

The Union, Board and court below misread Section 21A. It is not sufficient to pick out one part of Section 21 and dwell on that part in isolation. Sections 20 and 21 must be read in conjunction with one another and their various parts harmonized. JA 34-35. It is Section 20 which is the "no-strike" clause. It is entitled "Strikes-Lockouts." It expressly provides ". . . there shall be no strikes, boycotts, sitdowns, stoppages of work or any other form of interference with production or other operations on the part of the employees *during the term of this Agreement.*" (Emphasis added.) On the other hand, Section 21A is entitled "Grievance Procedure" and never mentions the word "strike." It never mentions the word "union." What it does mention is "employee" and "suspension or interruption of work." What it does provide is that an *employee* with a grievance shall not *suspend or interrupt* his (or her) work but shall promptly file a grievance. The Union's assertion that Section 21A constitutes "an express contractual commitment by the *union* not to *strike* over any 'grievance as to the interpretation or application of the terms of this Agreement' " is inaccurate. Brief of Respondent (Union), p. 19, n. 11. In fact, Section 21A is nothing more than a "cooperation" clause commonly contained in grievance procedures. According to a study of 1,717 major agreements conducted by the United States Department of Labor, virtually all (99%) included a grievance procedure and "[a] pledge by union and



management to utilize the contract grievance procedure machinery often prefaced the grievance provision of the contract. The pledge often included a general statement banning work stoppages during the processing of a grievance. . . ." The Department of Labor study goes on to provide several examples of a "Union-Management Cooperation in Grievance Handling" clause, including the following clause which is quite similar to Section 21A:

> "Should any differences arise between the Company and the union as to the meaning and application of the provision of this agreement . . . there shall not be a suspension of work on account of such differences, but an earnest effort shall be made to settle them promptly . . . ." *Major Collective Bargaining Agreements, Grievance Procedures*, United States Department of Labor, Bulletin No. 1425, pp. 14-15.

The purpose of Section 21A is to insure that an *employee* with a grievance files it promptly and returns to work, and that the parties attempt to resolve it quickly, whereas Section 20 is a pure no-strike clause prohibiting *strikes* by the *Union*. By its express terms, Section 20 expires when the agreement expires.

It is axiomatic that the Board or a court not ignore clear-cut contractual language. Hardly any language could be more clear-cut than Section 20. It is also a rule of contract construction that the various parts of a contract be interpreted so as to give meaning and effect to all parts. If Section 21A is a "no-strike" clause, as the Union contends, the clear-cut language of Section 20 is meaningless. If Section 21A is viewed as a

"cooperation" clause, which it is, and Section 20 a "no-strike" clause, which it is, meaning and effect can be given to both clauses. Thus, the contention the Union traded away its statutory right to strike after the contract expired in Section 21A in return for an arbitration clause is without merit because it specifically limited its pledge not to strike "to the term of this Agreement" in Section 20. This conclusion is consistent with the long-standing principle that a union will not be found to have waived a right absent "clear and unmistakable evidence of a waiver." *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708. The Board would never hold that Section 21A, standing alone, amounted to a "clear and unmistakable" waiver of the right to strike, especially when the provision is immediately preceded in the contract by a clearly written provision limiting its promise not to strike to "the term of this Agreement." *Universal Security Instruments,* 250 NLRB 661, 662 (1980), *enfd. in relevant part,* 649 F.2d 247, 256 (4th Cir. 1981).

## CONCLUSION

A reversal of the decision of the court below is the only result which (1) keeps faith with the long-standing precedent that arbitration is a matter of mutual consent, (2) gives credence to a policy favoring the *voluntary* arbitration of disputes arising from *existing* contracts, (3) does not undermine the right to strike guaranteed by §13 of the Act, (4) recognizes the strict waiver rules regarding waiving the right to strike, (5) is consistent with the mandate of §8(d) of the Act that the parties, not the government, decide what goes into a collective bargaining agreement, (6) will not spawn litigation over what rights "arise under" a contract or how much time is reasonable, (7) will provide certainty in a confused area



of law, and (8) reconciles and gives meaning to *all* of the contract language *agreed upon by the parties* in this case, including the introductory clause ("the stipulations set forth below shall be in effect for the time hereinafter specified"), Section 20, Section 21A and the termination clause.

A reversal of the decision of the court below will not bring on the Armageddon in labor-management relations projected by the Union. Nor is there any factual basis for the Union's assertion unions lower demands to convince employers to agree to arbitration. It is just as likely employers agree to increased union demands in order to convince unions to agree to arbitration. We do not know.

*Katz* is not properly before the Court and is not applicable in any event. In framing the *question* it was deciding and in stating its *holding,* the *Katz* Court made it clear the case was limited to a situation where an employer unilaterally instituted a change in a working condition during active contract negotiations. 369 U.S. at 737, 743, 747. No active contract negotiations were taking place in this case.

Section 8 of the Act prohibits certain conduct by both employers and unions as "unfair labor practices." 29 U.S.C. §158. Both are prohibited from "refus[ing] to bargain." Not coincidentally, this is the only unfair labor practice where Congress has precisely defined what is required to avoid a violation. 29 U.S.C. §158(d). No mention is made of arbitrating post-termination disputes. Furthermore, Congress has provided a specific remedy for the breach of a collective bargaining agreement; either party may sue the other in a district court to seek to compel the arbitration provided for in the collective bargaining agreement. 29 U.S.C. §185(a). In the face of this, the thrust of much of the Union's brief is

that this Court ought to find a violation of §8(a)(5) of the Act by affording it a broad interpretation because of the general policy favoring arbitration. A similar argument was made and rejected by Justice Stevens (writing for the eight participating Justices) in *Laborers Trust Fund v. Advanced Concrete*, 484 U.S. 539 at 551:

> "Our principal reason for rejecting these arguments is our conviction that Congress' intent is so plain that policy arguments of this kind must be addressed to the body that has the authority to amend the legislation, rather than one whose authority is limited to interpreting it."

Dated: February 21, 1991.

Respectfully submitted,

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